SUPREME COURT OF THE UNITED STATES

Office-Supreme Court, U.S.
FILED
AUG 10 1964
JOHN F. DAVIS, CLERK

OCTOBER TERM, 1964

No. 75

COLORADO INTERSTATE GAS COMPANY,
a Corporation,
Appellant,

vs.

THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS, SOUTHWEST KANSAS ROYALTY OWNERS ASSOCIATION AND PANHANDLE EASTERN PIPE LINE COMPANY,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS

JOINT MOTION TO DISMISS OF THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS

and

SOUTHWEST KANSAS ROYALTY OWNERS ASSOCIATION

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INDEX

Opinions Below 2

Jurisdiction 2

Questions Presented 2

Statement of the Case 2

Argument—

I. The Judgments of the Kansas Supreme Court Rest on Adequate Nonfederal Bases 6

II. These Proration Orders Do Not Violate the Federal Constitution or the Natural Gas Act 7

Conclusion 12

CASES AND AUTHORITIES CITED

Buck v. *California*, 343 U.S. 99 7

Cities Service Gas Company v. *Peerless Oil & Gas Co.*, 340 U.S. 179 8

Fay v. *Noia*, 332 U.S. 391 6

Federal Power Commission v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 498 10

Nickel v. *Cole*, 256 U.S. 222 7

Northern Natural Gas Company v. *State Corporation Commission*, 372 U.S. 84 10

Reserve Oil and Gas Co. et al., Docket Nos. G-4720 *et al.*, issued April 2, 1964 9

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15 U.S.C., §717b 11

28 U.S.C., §1257(2) 2

G.S. Kan., 55-606 ..... 4, 5, 6

G.S. Kan., 60-2921 6

H.R. Rep. No. 709, 75th Cong., 1st Sess., p. 2 11

Murphy, *Conservation of Oil & Gas*, a Legal History (1948) 12

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MOTION TO DISMISS

Pursuant to Revised Rule 16 of this Court, Appellees State Corporation Commission of the State of Kansas[1] and Southwest Kansas Royalty Owners Association[2] move to dismiss these appeals because the judgments of the Kansas Supreme Court rest on adequate nonfederal bases and no substantial federal question is presented.

1. Hereinafter called Commission.
2. Hereinafter called Landowners.

OPINIONS BELOW

The opinions of the Kansas Supreme Court are reported at 192 Kan. 1, 386 P.2d 266[3] and 192 Kan. 29, 386 P.2d 288[4].

JURISDICTION

Appellant attempts to invoke the jurisdiction of this Court under 28 U.S.C. §1257(2).

QUESTIONS PRESENTED

Whether the judgments of the Kansas Supreme Court rest on adequate nonfederal grounds and whether any substantial federal question is presented.

STATEMENT OF THE CASE

These appeals involve gas proration orders issued by the Commission for the Kansas Hugoton Field. The proration orders are addressed to and directed solely to producers—not purchasers—and fix the maximum amount of gas that can be produced from each well. They are permissive orders and do not require any producer to produce any gas.

Each opinion of the Kansas Supreme Court disposed of several appeals, each of which involved several separate proceedings in the District Courts of Finney and

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3. Hereinafter called first opinion. Reproduced at Appendix A to Jurisdictional Statement.

4. Hereinafter called second opinion. Reproduced at Appendix B to Jurisdictional Statement.

Stevens Counties, Kansas. It will be necessary to outline the various proration orders involved in each proceeding in each District Court and the various judgments of the District Courts involved in the various appeals to the Kansas Supreme Court.

A. The First Opinion of the Kansas Supreme Court.

The first opinion of the Kansas Supreme Court disposed of Cases Nos. 41,515, 41,516, 41,555 and 41,556. Appellant has appealed these cases (Appellant's Notices of Appeal to Supreme Court of the United States).

1. Cases Nos. 41,516 and 41,556.

Appellant was not a party to these cases in the Trial Court and did not appeal the cases to the Supreme Court of Kansas (Nos. 41,515 and 41,516, Abstract of the Record, 351-3; Nos. 41,555 and 41,556, Appellant's Abstract of the Record, 178-80).

2. Cases Nos. 41,515 and 41,555.

Appellant initiated these cases in the Finney County Court to review various proration orders and a general order. The Trial Court set aside the general order and set aside the Commission's proration orders and substituted its own proration orders (Nos. 41,515 and 41,516, Abstract of the Record, 337-8; Nos. 41,555 and 41,556, Appellants' Abstract of the Record, 181).

The Supreme Court of Kansas reversed the judgments of the Finney County Court because, among other grounds:

> (a) The Trial Court did not have jurisdiction to review the proration orders issued prior to November, 1957, because Appellant had not filed petitions for rehearing with the Commission, as required

by the Kansas Judicial Review Act[5] (192 Kan. at 10-2, 386 P.2d at 275-6; Appendix A to Jurisdictional Statement, A 14-7).

(b) The Trial Court did not have jurisdiction to review the general order because the attempted review proceeding was premature under the Kansas Judicial Review Act[6] (192 Kan. at 12-4, 386 P.2d at 276-7; Appendix A to Jurisdictional Statement, A 18-9).

(c) As to all proration orders, the Trial Court exceeded its authority under the Kansas Judicial Review Act,[7] by promulgating its own proration orders, rather than judicially reviewing the Commission's proration orders (192 Kan. at 14-6, 386 P.2d at 277-8; Appendix A to Jurisdictional Statement, A 19-22).

(d) The Trial Court erred in failing to make findings of fact and conclusions of law as required by G.S. Kan., 60-2921 (192 Kan. at 16-7, 386 P.2d at 278-9; Appendix A to Jurisdictional Statement, A 23-4).

B. The Second Opinion of the Kansas Supreme Court.

The second opinion of the Kansas Supreme Court disposed of Cases Nos. 42,175, 42,176, 42,185 and 42,230 (consolidated by the Kansas Supreme Court)[8] and 42,038. Appellant has appealed these cases (Appellant's Notices of Appeal).

1. Consolidated Cases.

These cases were initiated by Appellant and others in the Finney County Court to review various proration

5. G.S. Kan., 55-606.

6. *Ibid.*

7. *Ibid.*

8. Hereinafter called consolidated cases.

orders. The Kansas Supreme Court held that the Finney County Court lacked jurisdiction, under the Kansas Judicial Review Act,[9] to review such proration orders and reversed with instructions to dismiss (192 Kan. at 32-5, 386 P.2d at 290-2; Appendix B to Jurisdictional Statement, A 49-51).

2. Case No. 42,038.

The Landowners initiated this case in the Stevens County Court to review the same proration orders involved in the consolidated cases. Prior to trial, the Stevens County Court was informed that Appellant had, after the commencement of the Stevens County proceedings, filed petitions to review the same proration orders in the Finney County Court. The Stevens County Court ordered Appellant to present its grievances concerning such proration orders to the Stevens County Court (No. 42,038, Abstract and Counter Abstract of Southwest Kansas Royalty Owners Association, 239-41).

Appellant refused to follow the Court's order. It did not participate in this case in the Trial Court and did not appeal such judgment to the Kansas Supreme Court (192 Kan. 29, 386 P.2d 288; Appendix B to Jurisdictional Statement A 43).

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9. G.S. Kan., 55-606.

ARGUMENT

I. The Judgments of the Kansas Supreme Court Rest on Adequate Nonfederal Bases.

Appellant was not a party to Cases Nos. 41,516, 41,556 and 42,038 and did not appeal the judgments of the Trial Court to the Kansas Supreme Court. It has no standing to appeal such cases to this Court.

In Cases Nos. 41,515, 41,516 and the consolidated cases, the Supreme Court of Kansas held that, under the Kansas Judicial Review Act,[10] the Trial Court did not have jurisdiction. This is clearly a nonfederal ground.

The Kansas Supreme Court also held, in Cases Nos. 41,515, 41,516, 41,555 and 41,556, that the Trial Court exceeded its authority, under the Kansas Judicial Review Act,[11] when it promulgated proration orders rather than judicially reviewing the Commission's proration orders, and erred in not making findings of fact and conclusions of law, as required by Kansas law.[12] Again, clear-cut nonfederal grounds.

This Court does not review state court judgments based on adequate nonfederal grounds:

> "It is a familiar principle that this Court will decline to review state court judgments which rest on independent and adequate state grounds, notwithstanding the copresence of federal grounds [Citations omitted]" *Fay* v. *Noia*, 332 U.S. 391, 428.

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10. G.S. Kan., 55-606.

11. *Ibid.*

12. G.S. Kan., 60-2921.

Other cases recognizing this rule are *Buck* v. *California*, 343 U.S. 99; *Nickel* v. *Cole*, 256 U.S. 222, 225; and cases cited therein.

The judgments of the Supreme Court of Kansas are based on adequate nonfederal grounds that the Trial Court lacked jurisdiction, exceeded its statutory authority and failed to follow state trial procedure. Any of these nonfederal grounds are sufficient to sustain the judgments of the Kansas Supreme Court. Appellant's appeals should be dismissed.

II. These Proration Orders Do Not Violate the Federal Constitution or the Natural Gas Act.

The above discussion demonstrates that no federal questions are properly presented and these appeals should be disposed of accordingly. However, due to the fact that imaginative counsel, aided in no small part by a voluminous record, has distorted this appeal to the point that the Kansas Supreme Court and the Commission have been accused of engaging in some sort of unlawful scheme, we feel compelled to briefly mention the merits of these appeals.

Appellant concedes that a state can prorate gas when necessary to prevent waste or protect correlative rights. It contends, however, that there was no evidence that these proration orders were necessary to prevent waste or protect correlative rights and, therefore, they violate federal law.

The record before the Kansas Commission contains extensive expert testimony on the technical phase of waste prevention and protecting correlative rights. The record is conclusive that the proration orders involved in these proceedings were necessary and designed to prevent phys-

ical waste of natural gas and to protect the correlative rights of the landowners and lessees.

It was evident from this investigation that unless the gas from the Hugoton Field was produced at a rate in excess of the rate it was then being produced 70% to 80% of the 4,000 wells in the field would ultimately fail due to pipe corrosion. The corrosion of pipe would permit otherwise recoverable gas to be lost. Pipe corrosion permitted the encroachment of water into the producing formation causing permanent damage to the reservoir. Wells that failed due to corrosion would ultimately have to be replaced with expensive new wells or the gas would be lost.[13]

The instances of pipe failure due to corrosion greatly increased with the age of the wells. To reduce pipe failures and the resulting loss of gas the field had to be produced at a more reasonable and realistic rate. The evidence clearly showed that the slow rate of production and the resulting loss of gas due to pipe corrosion resulted from the methods followed by the Kansas Commission in determining the market demand for the field and in calculating the allowables for the wells. If waste is caused by unwarranted limitation of production the correction of such a limitation is certainly a waste preyention measure.

Appellant's contention that these proration orders violate the Commerce Clause to the Federal Constitution was rejected by this Court in *Cities Service Gas Company v. Peerless Oil & Gas Co.*, 340 U.S. 179. There the Okla-

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13. Nos. 41,515 and 41,516, Abstract of the Record, 71, 77-8, 84-6, 90, 92-3, 98, 272; Nos. 41,555 and 41,556, Appellant's Abstract of the Record 24 41; No. 42,038, Abstract and Counter Abstract of Southwest Kansas Royalty Owners Association 78, 101

homa Commission ordered an interstate purchaser to buy gas and fixed the price. Cities Service Gas Company made the same constitutional argument that Appellant now advances.

> This Court disposed of the contention in short order: "It is now well settled that a state may regulate matters of local concern over which federal authority has not been exercised, even though the regulation has some impact on interstate commerce." 340 U.S. at 186.

We have some difficulty understanding Appellant's contention that these proration orders invade the jurisdiction of the Federal Power Commission. Appellant complains that such orders are invalid because the Commission did not find the market demand to be equal to the nominations of the pipelines and, therefore, the orders violate federal law. Appellant, however, engaged in the flippant practice of nominating "0" Mcf.[14] The Commission refused to believe such "0" nominations and considered other evidence in determining the market demand. Surely, this did not violate federal law.

We do not think that Appellant seriously suggests that the overwhelmingly complicated task of prorating gas for all states should be turned over to the Federal Power Commission.

The Federal Power Commission recognizes that it has no such authority:

> "[petitioner's] contentions in effect are that this Commission should perform the functions of prorating takes and adjusting correlative private rights of producers within a field; matters which it seems to us should be decided by the Commonwealth of Ken-

14. Nos. 41,515 and 41,516, Abstract of the Record 104, 305-6.

tucky . . ." *Reserve Oil and Gas Co. et al.*, Docket Nos. G-4720, *et al.*, issued April 2, 1964.[15]

This position is in accord with the decisions of this Court.

In *Federal Power Commission v. Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, this Court noted that:

> "The legislative history of this Act is replete with evidence of the care taken by Congress to keep the power over the production and gathering of gas within the states. This probably occurred because the state legislatures, in the interest of conservation, had delegated broad and elaborate power to their regulatory bodies over all aspects of producing gas" (Footnotes omitted) 337 U.S. at 509-13.

In the footnote to the above quotation, this Court said "See, for example, Kansas Gen. Stat. C. 55, §§ 701-713 . . ."[16]

This Court also made it clear that the states retained this power in *Northern Natural Gas Company v. State Corporation Commission*, 372 U.S. 84, when it noted that:

> "The State does not, however, appear to be without alternative means of checking waste and disproportionate or discriminatory taking" 372 U.S. at 94.

In the footnote to this quotation, this Court noted that "the availability of regulatory alternatives, particularly in the form of proration and similar orders directed at producers, has been much discussed."[17]

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15. Rehearing has since been granted on other issues.

16. *Federal Power Commission v. Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 513 n. 17.

17. *Northern Natural Gas Company v. State Corporation Commission*, 372 U.S. 84, 94 n. 12.

Apparently, Appellant contends that the Federal Power Commission must be given the power to prorate gas because the Kansas proration orders will cause conflicts to arise among the state proration agencies and with the Federal Power Commission. Not only does this argument do violence to the very plain and well known Congressional intent that the states should retain their power to prorate gas,[18] but it also overlooks the fact that the orders here under review were issued more than eight (8) years ago. There has been no conflict among the states or with the Federal Power Commission. There has been no interference with interstate sales or transportation of gas.

The Congressional mandate that the states should retain control over the production of natural gas has been recognized by the Court on many occasions. The heart and soul of such regulation are proration orders. If, as Appellant suggests, the states do not have this power, there is no area left for state regulation. To say the least, this would do violence to the very clear statement that the Natural Gas Act does not cover "the production . . . of natural gas".[19]

This appeal does not present any substantial federal question and should be dismissed.

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18. Many states were prorating gas when the Natural Gas Act was passed (See, Murphy, Conservation of Oil & Gas, A Legal History, 1948) and, prior to passage, Congress was assured that the Act "takes no authority from State Commissions as it is so drawn as to complement and in no manner usurp State regulatory authority" (H.R. Rep. No. 709, 75th Cong., 1st Sess., p. 2).

19. 15 U.S.C. §717b.

CONCLUSION

The judgments of the Kansas Supreme Court rest on adequate nonfederal grounds and do not involve a substantial federal question.

Appellees' motion should be granted and the appeals dismissed.

Respectfully submitted,

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